Nik Che Kok @ Nik Soo Kok v Public Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–438 OF 1998
SHAIK DAUD, MOKHTAR SIDIN AND MOHD SAARI JJCA
8 MARCH 2001

Civil Procedure *— Action — Limitation period — Loan agreement — Demand for repayment from guarantors — Whether action time-barred — When time begins to run — Appeal — Limitation Act 1953 s 6(1)(a)*

Civil Procedure *— Pleadings — Striking out claim — Application under O 18 r 19 — Action for repayment of loan — Whether action statute-barred — Rules of the High Court 1980 O 18 r 19*

The respondent approved a fixed loan of RM6m to a company whereby the appellant stood as one of the guarantors. The respondent issued three letters of demand. The first demand was made on 2 April 1986. On 20 July 1993 the respondent issued a third demand and consequently filed this present suit against the appellant on 21 June 1996. The appellant filed a summons in chambers to have the respondent's claim struck out under O 18 r 19 of the Rules of the High Court 1980 on the ground that the respondent's claim was statute barred by virtue of s 6(1)(a) of the Limitation Act 1953. The respondent submitted that by the first notice of demand dated 2 April 1986, the liability of the guarantor did not arise because that notice merely calls for payment of overdue interest and not a demand for the repayment of the loan. The appellant's application was allowed but on appeal, the High Court reversed the decision of the senior assistant registrar on the ground that there are triable issue. The appellant appealed.

Held, allowing the appeal:
The liability of the principal debtor as well as that of the guarantors arose from the first notice of demand dated 2 April 1986. There is no general rule that a notice of demand must specifically mention the precise amount owing. A demand is for the purpose of bringing home to the debtor that the creditor is demanding its money. For the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action. In the present case the earliest time the respondent could have commenced a suit was on after issuing the notice of demand of 2 April 1986. Since the suit was filed more than six years after the cause of action accrued, the suit was statute barred by virtue of s 6(1)(a) of the Limitation Act 1953 (see p 331A–C).

[**Bahasa Malaysia summary**

Responden membenarkan satu pinjaman tetap bernilai RM6j kepada sebuah syarikat di mana perayu berperanan sebagai salah seorang

penjamin. Responden mengeluarkan tiga pucuk surat tuntutan. Tuntutan pertama dibuat pada 2 April 1986. Pada 20 Julai 1993, responden mengeluarkan tuntutan ketiga dan berikutan itu memfailkan guaman ini terhadap perayu pada 21 Jun 1996. Perayu memfailkan satu saman dalam kamar untuk membatalkan tuntutan responden di bawah A 18 k 19 Kaedah-kaedah Mahkamah Tinggi 1980 atas alasan bahawa tuntutan responden dihalang oleh statut disebabkan s 6(1)(a) Akta Pembatasan 1953. Responden berhujah bahawa melalui notis tuntutan pertama bertarikh 2 April 1986, liabiliti penjamin tidak timbul kerana notis tersebut hanya meminta bayaran bagi faedah yang melampaui tempoh, dan tidak menuntut bayaran semula pinjaman tersebut. Permohonan perayu dibenarkan tetapi semasa rayuan, Mahkamah Tinggi mengakaskan keputusan penolong kanan pendaftar tersebut atas alasan bahawa terdapatnya perkara yang boleh dibicarakan. Perayu itu merayu.

Diputuskan, membenarkan rayuan tersebut:
Liabiliti penghutang utama dan juga penjamin-penjamin timbul dari notis tuntutan pertama bertarikh 2 April 1986. Tiada peraturan umum yang mengatakan bahawa notis tuntutan mestilah menyatakan jumlah yang terhutang secara khusus. Tuntutan bertujuan mengingatkan penghutang bahawa pemiutang ingin menuntut wangnya. Bagi tujuan pembatasan, masa mulai dikira dari waktu yang terawal ketika pemiutang boleh mengambil tindakan undang-undang. Dalam kes ini, waktu yang terawal ketika pemiutang boleh memulakan guaman adalah selepas notis tuntutan pertama dikeluarkan pada 2 April 1986. Oleh kerana guaman tersebut difailkan lebih daripada enam tahun selepas kausa tindakan tersebut terakru, guaman tersebut dihalang statut disebabkan s 6(1)(a) Akta Pembatasan 1953 (lihat ms 331A–C).

Notes

For cases on limitation period of cause of action, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 109–111.
For cases on striking out of claim, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3681–3684.

Cases referred to

O'day v Commercial Bank of Australia (1993) 50 CLR 200 (refd)

Legislation referred to

Limitation Act 1953 s 6(1)(a)
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No S–3–22–283 of 1996 (High Court, Kuala Lumpur)

Loh Siew Cheang (*Rajashree Suppiah* and *Roy Sreenivasan* with him) (*Cheang & Ariff*) for the appellant.

Jordon Sugunasingam (*Iza Ng Yeoh & Kit*) for the respondent.

Shaik Daud JCA. (delivering judgment of the court): This is an appeal against the decision of the High Court, which refused to strike out the respondents claim against the appellant. The appellant had filed a summons in chambers before the senior assistant registrar ('the SAR') to have the respondent's claim struck out under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'), on the ground that the respondent's claim was statute barred by virtue of s 6(1)(a) of the Limitation Act 1953 ('the Act'), ie six years from the date cause of action arose. The application was allowed, but on appeal, the High Court reversed the decision of the SAR on the ground that there are triable issues and that the case was not one fit to be struck out under O 18 r 19 of the RHC.

The facts are that on 5 October 1982, the respondent approved a fixed loan of RM6m to a company called Nik Seng Development Sdn Bhd. The appellant and two others executed a letter of guarantee dated 29 December 1982 and undertook to pay on demand.

The respondent issued a total of three demands. The first demand was made on 2 April 1986. Arising out of the first demand, the respondent sued the principal debtor, Nik Seng Development Sdn Bhd. Strangely enough none of the guarantors were included in that suit. Then on 15 May 1986, the respondent issued a second demand against the principal debtor, and the appellant and the other guarantors. Arising out of the second demand, the respondent filed a second suit against the appellant and two other guarantors. Some six years later, the respondent withdrew the suit against the appellant and the two other guarantors without assigning any reason for the withdrawal. On 20 July 1993, the respondent issued a third demand and consequently filed this present suit against the appellant on 21 June 1996, ie about three years later. The issue before the court is when did time begin to run for the purposes of s 6(1)(a) of the Act. It is clear that no action founded on a contract shall be brought after the expiration of six years from the date on which the cause of action accrued? Therefore, in the circumstances of this contract, when did the cause of the action accrue. It is the contention of the learned counsel for the appellant that it accrued from the first notice of demand dated 2 April 1986. Therefore, as the present suit was filed on 21 June 1996 it is time barred pursuant to s 6(1)(a) of the Act. Learned counsel for the respondent, on the other hand, submitted that by the first notice of demand dated 2 April 1986, the liability of the guarantor did not arise because that notice merely called for payment of overdue interest and was not a demand for the repayment of the loan.

The High Court came to the conclusion that looking at all the three allegedly notices of demand, there were no sufficient evidence to show whether they are actually notices of demand under the letter of guarantee and that these had raised triable issues. Therefore, not a fit and proper case to strike out the respondent's claim.

Looking at the facts and circumstances of this case, we are of the view that the liability of the principal debtor as well as that of the guarantors arose from the first notice of demand dated 2 April 1986. For all intents and purposes it is a notice of demand failing which the respondent could have legally filed a suit against the principal debtor as well as against the guarantors. Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a demand is for the purpose of bringing home to the debtor that the creditor is demanding its money. (See *O'day v Commercial Bank of Australia* (1993) 50 CLR 200). It is our view that for the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action. In the present case the earliest time the respondent could have commenced a suit was soon after issuing the notice of demand of 2 April 1986, On the facts of this case, we are of the view that since the suit was filed more than six years after the cause of action accrued, the suit is statute barred by virtue of s 6(1)(a) of the Act. In the premises we allowed the appeal with costs and ordered that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Jafisah Jaafar